IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 11 of 2003

Shri Sanjay Gulabrao Kale
age about 32 years, Occ. business
r/at Flat no.A/1, C Building,
Puja Heights, Gananjay Society,
Jawad, Kothrud, Pune 411 029 .. Appellant
(Orig.Applicant)

V/s

Sou.Rohini Sanjay Kale
age 26 years, Occ. service
r/at C/o Shri Sopanrao P. Saste
residing at Flat No.A-3 in
Amrish, S.No.115, Paud Road,
Kothrud, Pune 411 029 (New 411 038)
and also Z Primary School,
At Post Bhugaon, Tal. Mulshi
District Pune ..Respondent
(Orig.Respondent)

Ms Smita Mane with Mr.P.B.Shah for Appellant
Mr.P.M.Mengane for Respondent

CORAM:S.B.MHASE AND
S.R.SATHE,JJ.
DATED:10th Oct. 2006

ORAL JUDGMENT :- (Per S.R.Sathe,J.)

1. The Appellant-husband, original Petitioner in M.P.No.359 of 1999 has preferred this appeal against the judgment and order passed by the Judge, Family Court, Pune whereby his petition filed against the Respondent-wife for divorce on the ground of cruelty was dismissed. For the sake of convenience hereafter the parties shall be referred to as Petitioner and Respondent.

2. Brief facts giving rise to this appeal are as under:

. The marriage between Petitioner and Respondent took place on 8-3-1996 as per Hindu Vedic Rites at Pune. Since prior to marriage, Respondent was serving as a primary teacher at village Sakurde, Taluka Saswad, District Pune. For a period of about 6 months after marriage Respondent stayed at her maiden home and carried out her job at Sakurde. Thereafter, she was transferred to village Bhugaon, Taluka Mulshi, District Pune. Since then she started residing along with Petitioner at Pune.

3. Accoding to the Petitioner since beginning the Respondent was very obstinate and antagonistic. She was not really interested in marital life and had no desire to cohabit with the Petitioner happily. On flimsy grounds she used to quarrel with Petitioner and his mother. She even used to abuse them in vulgar language. She often used to go to her maiden home and stay there for long time without informing the Petitioner. When Petitioner informed about the conduct of the Respondent to her parents they advised the Petitioner to reside separately with a view that there should not be any trouble to his parents. The Petitioner started residing separately along with the Respondent, though he was in fact not willing to do so. In spite of the same, there was no improvement in the conduct of the Respondent. She used to pick up quarrel and avoid to carry out the work

of even cooking.

4. Out of the said wedlock the Petitioner and Respondent have a son by name Pranav. He is born on 4-8-1997. As it was premature delivery there was some disability in Pranav. Doctor diagnosed him as deaf and dumb. According to the Petitioner the Respondent was not taking proper care of Pranav. In August 1998 the Respondent picked up quarrel and left the matrimonial home and told the Petitioner that she will not return and that she is capable of maintaining herself and son. According to the Petitioner, few days thereafter the father of the Respondent left the Respondent to matrimonial home and assured that Respondent would not behave improperly. However, it is the case of the Petitioner that even thereafter on one day at night she picked up quarrel and raised her voice and said that the Respondent was not capable of cohabiting and he was having affairs outside. On the day of **GHATSTHAPANA** of the year 1998 Respondent picked up quarrel in presence of Petitioner's relatives and insulted him in their presence. Though he tried to give understanding, the Respondent did not listen to him. On 9-1-1999 Respondent left the matrimonial home in the morning for attending her duty. However, she did not return till 6-00 p.m. Naturally, Petitioner started search for her and he came to know that Respondent had in fact left the school at 11-00 a.m. On that day Respondent returned home late at night. The Petitioner

asked her explanation about the same on that she abused and even pushed the Petitioner. Not only that, but she also gave threat that in case any further query is made or explanation is asked, she would finish him. On so saying she left the house and went to her maiden home. She returned on 11-1-1999. However, on that day also she returned home late at night. Thereafter she left the house on the pretext of giving a phone call at her maiden home and returned to matrimonial home along with Police. Thereafter Respondent's brother and uncle were called and they took her to their house. However, one hour after that the Petitioner was called at Shastrinagar Police chowky. When he went there, he found that the Respondent was in the said Police chowky. Police therefore made enquiry with both of them and told both of them that they should behave properly with each other. Even then the Respondent went to her maiden home along with her father. According to the Petitioner, she did not return thereafter, though he requested for the same.

5. It is petitioner's case that he therefore issued notice dated 1-4-1999 to Respondent for divorce. The Respondent however did not give any reply hence the Petitioner filed petition for divorce on the ground of cruelty on 24-5-1999 and also claimed permanent custody of minor son Pranav.

6. The Respondent filed her written statement at Exh.9

and admitted the marriage and the fact that out of the said wedlock they have a son by name Pranav. She however, denied all the allegations made against her by the Petitioner and contended that since the time she started residing at Petitioner's house she was carrying out all household work and also attending her duty regularly. It was her practice to hand over the amount of her salary to the Petitioner. It is her contention that till the birth of Pranav, the Petitioner and her in laws treated her well. However, when Pranav was born and it was diagnosed that he is deaf and dumb the Petitioner as well as her in laws started ill-treating her and alleged that she is responsible for giving birth to such a child and she should suffer for the same. They also started taunting her and they even took all her ornaments. The Petitioner told her that money is required for his business and on that ground he even asked her to close her recurring account and took amount of Rs.13,000/- out of the said account. As it was necessary for her to go to school every day and the Petitioner and his parents were not ready to look after the minor child, she started keeping the child in creche. Not only that, after few days the Petitioner started saying that he would perform second marriage and as such she should give divorce to him and take the child with her. On that ground he even started beating her. His father and uncle tried to tell the Petitioner to behave properly. However, there was no improvement. On the

contrary, he told them that they should take Respondent with them. In spite of this she continued to live with the Petitioner with a hope that one day or other there will be improvement.

7. It is Respondent's case that on 9-9-1991 when she returned from the school in the afternoon, the Petitioner started quarrel with her and told her that she should give divorce to him and leave the house along with child. On that ground he abused and assaulted her and ultimately drove her out of house by giving threat that if she returns he would finish her. As a result of the same she was constrained to go to her maiden home. It is her contention that on 11-1-1999 at about 8-00 p.m. she went to her matrimonial home along with her son Pranav and her uncle and brother. However, the Petitioner and his parents and sister did not allow her to enter the house and on the contrary insulted them. As a result of the same she was constrained to approach the Police. Ultimately, when Police told the Petitioner that he should allow the Respondent to stay in his house she stayed there. However, on the next day again the Petitioner picked up quarrel and assaulted her and drove her out of the house. She therefore gave a phone call to her father and ultimately they went to the Police. The Petitioner then assured the Police that he would cohabit with Respondent and would see that she will not have any grievance thereafter. It is her contention that though

thereafter she started residing in the Petitioner's house, the petitioner did not keep physical relations with her. He only used to say that he would find out some way or solution and that even if she receives any notice she should not take the same. As there was marriage of Respondent's brother the petitioner left her at village Sakurde on 24-4-1999. However, thereafter he told her that she should return to matrimonial home after May Vacation is over. The Petitioner did not even attend the marriage ceremony of Respondent's brother. It is her contention that the Petitioner did not spend money for purchase of hearing aid instrument for Pranav but only secured the receipt from the Respondent. At the end of May 1999, when Respondent asked the Petitioner to take her with him by giving phone call, the petitioner told her that their relations have come to an end and she should wait for notice.

8. The Respondent has contended that after the above incident along with Pranav, her father and uncle she went to the petitioner's house. At that time one Dhamdhere had also accompanied them. The Petitioner and his family members insulted the Respondent and his father and drove them out of house. Naturally, the Respondent went to Police Station, However, Police told them that as the matter is subjudice they would not take cognizance. Thereafter, Respondent received summons of the above mentioned application. Even thereafter, she made efforts

through some relatives but the Petitioner was not ready to accept the Respondent. According to her, as a result of the above situation, she did not give reply to the notice dated 1-4-1999. She contended that it was all along her desire to cohabit with the Petitioner, however, petitioner ill-treated her and ultimately filed false application. Hence, on all these grounds she prayed for dismissal of the application and also claimed interim maintenance for herself and Pranav.

9. During pendency of the marriage petition and after having meeting with the Marriage Counsellor Petitioner and Respondent filed one joint purshis Exh.41 dated 3-6-2001 and submitted that they have cleared the misunderstanding which they were having against each other and decided to cohabit with each other at Respondent's house, C-1 Pooja Heights, Gananjay Society, Kothrud, Pune 411 029. The Petitioner also gave assurance that he would not cause any physical or mental harassment to the wife and would cohabit with her and the Respondent would also live happily along with the Petitioner and his family members. Both of them therefore requested the Court that case be kept pending for a period of six months.

10. On 24-3-2002 the Petitioner filed an application Exh.53 and stated therein that though as per purshis Exh.41 he had taken the Respondent with him, he did not

find any improvement in the behaviour of the Respondent and as such he has decided to take divorce and the marriage petition be proceeded. Accordingly, he sought amendment in the Marriage Petition and the same was allowed. The Respondent filed her additional written statement at Exh.55 and denied the allegations made against her by the Petitioner and contended that after Purshis Exh.41 the Petitioner took Rs.25,000/- from her and obtained accommodation at Shivteerth Nagar, Kothrud on leave and licence basis and they started residing there. During that period she was residing happily with the Petitioner. However, the Petitioner at the instance of his family members persisted his demand for divorce and then in October 2001 left her at the said place and started residing with his parents. She therefore, contended that the petition for divorce be dismissed.

11. On these pleadings the learned trial Judge framed issues at Exh.44. In order to prove his case the Petitioner examined himself at Exh.51. As against this, the Respondent wife examined herself at Exh.60 and her father at Exh.62. She also produced one letter written by the Petitioner to her father at Exh.58.

12. During the pendency of the marriage petition, as per agreement between the parties, Pranav was given in the custody of the Petitioner and Respondent was given an access to Pranav.

13. After considering the evidence adduced by both the parties the learned Judge, Family Court, Pune came to the conclusion that the Petitioner husband has failed to prove that the Respondent wife treated him with cruelty or that she deserted him. Naturally, the learned Judge dismissed the petition for divorce.

14. Being aggrieved by the above mentioned judgment and order the Petitioner husband has filed the present appeal. In this appeal before us, the learned Advocate for the Appellant husband has urged only two points. Firstly she submitted that the learned trial Judge has not properly appreciated the evidence on record and has wrongly held that Respondent's conduct was not amounting to cruelty. Secondly, it was canvassed before us that marriage between Petitioner and Respondent has irretrievably broken down and as such divorce be granted. As against this, Shri Mengane, learned Advocate for the Respondent supported the judgment and order passed by the learned trial Judge.

15. It is an admitted fact that the marriage between the Petitioner and Respondent took place on 8-3-1996 and for a period of about 6 months thereafter the Respondent wife was residing at her maiden home and used to go to her service place i.e. at Sakurde and thereafter she was transferred to Baugaon and started residing with the

Petitioner husband. Admittedly, out of the said wedlock they have a son by name Pranav. Unfortunately, Pranav is deaf and dumb and as a result of the same he is under medical treatment.

16. It is the case of the Petitioner husband that he is entitled for a decree of divorce on the ground mentioned in Section 13(1)(ia) of the Hindu Marriage Act, 1955 i.e. on the ground of cruelty. Naturally, question arises what cruelty means. The word cruelty is not defined in Hindu Marriage Act. However, there are various authoritative pronouncements including V. Bhagat Vs B. Bhagat **AIR 1994 SC 710** wherein Their Lordships have observed that mental cruelty is that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. It is needless to say that while deciding whether particular conduct amounts to cruelty as contemplated under Section 13(1)(ia) of Hindu Marriage Act, regard must be given to the social status, educational level of the parties, society in which they live, the traditions and customs that are followed in the families of the parties. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. So, bearing in mind this position of law, we have to scan the evidence on record to find out as to whether the petitioner husband has

proved that conduct of the Respondent wife was amounting to cruelty.

17. In order to prove his case, the Petitioner has examined himself at Exh.51. He has stated that the Respondent was of hot temperament, there were quarrels on trifle reasons and she used to prepare her bag and go to her parents every time and that also without informing him. He has also stated that as per advise of her parents he even started residing separately along with Respondent though in fact he wanted to reside with his parents, however, even thereafter there was no improvement in Respondent's behaviour and she was not preparing food and at times used to neglect their son Pranav. It is pertinent to note that though the Petitioner has stated that Respondent used to pick up quarrels he has not at all specifically pleaded or stated in evidence any particular incident on account of which the Respondent wife had picked up quarrel. The entire evidence of the Petitioner is very vague and scanty. Mere vague statement that the Respondent used to quarrel on trifle ground or that she used to abuse, is certainly not sufficient to jump to the conclusion that the conduct of the Respondent was amounting to cruelty as contemplated under the Act.

18. The Petitioner has stated that on 9-1-1999 it was Saturday, the Petitioner attended the school and did not

return. He therefore made enquiry and he came to know that she left the school at 11-00 a.m.. On that day she returned home at 7-00 p.m. and when he asked explanation about the same, she gave threat that she would cause harm to him and on so saying she left the house. She again returned back on 11-1-1999 at 7-00 p.m. and when he asked reason for late coming she again left the house at 11-00 p.m. for the purpose of giving phone call and returned home with Police and then the Police convinced both of them. It is pertinent to note that in order to support this version of the Petitioner he has not examined any other witness. On the contrary, the Respondent has specifically stated that on 9-1-1999 after she returned to her matrimonial home the Petitioner told that she should give divorce to him and on that count he harassed her and as a result of the same she was constrained to go to her maiden home. She has also stated that on 11-1-1999 she went to matrimonial home along with her brother but at that time the Petitioner did not allow them to enter the house and hence they approached the Police and accordingly Police had come to their house. It is pertinent to note that in this connection even the Petitioner has also admitted that he was called by Police. So, one thing is certain that on 11-1-1999 it was the Respondent who approached the Police and made a grievance about the Petitioner. If really there would not have been any incident as contended by the Respondent and Respondent really wanted to leave the

house on her own, she would not have gone to Police and made a complaint about the husband. What is more to be noted is that when the Police intervened and gave understanding to the Petitioner she even resided with the Petitioner. So, the alleged incidents dated 9-1-1999 and 11-1-1999 are not at all sufficient to show that conduct of the Respondent was amounting to cruelty.

19. An attempt was made on behalf of the Petitioner to show that Respondent had made reckless statement that the Petitioner is not capable of cohabiting and has affairs outside. However, it is pertinent to note that there is no independent witness to corroborate this version. The Petitioner has also not even examined his parents who used to be in the house. What is more to be noted is if really such reckless statement would have been made by the Respondent then normally the Petitioner would have mentioned the same in the notice which was alleged to have been sent by him to the Respondent. However, if we peruse the said notice which is at Exh.52, there is no mention about Respondent making such allegation against the Petitioner. So, the Petitioner has also failed to prove his case in this behalf. Incidently, it must be noted that though the Petitioner has averred that he had sent a notice dated 4-1-1999 he has not adduced any evidence to show that the said notice was actually received by the Respondent. On the contrary, the Respondent has categorically stated that she did not

receive the said notice. During hearing of the petition when we called upon the Petitioner to produce the acknowledgment he could not do so. On the contrary he produced one envelope from which it is clear that the same was not served on the Respondent.

20. It is pertinent to note that admittedly during the pendency of the marriage petition, both the parties filed joint purshis Exh.41. In that purshis also the Petitioner husband has specifically assured that he would not ill-treat or harass, physically or mentally, to the Respondent. So, this also suggests that whatever harassment was there, was from the Petitioner's side and not from the Respondent. In fact that is why the Respondent had even approached the Police. The Petitioner has tried to make out a case that even after that time he took the Respondent to his house during the pendency of the petition but there was no improvement in the behaviour of Respondent and as such he again moved the Court. It is pertinent to note that he has only made a vague submission that there was no improvement in the conduct of the Respondent. However, he has not at all narrated even one single incident showing improper behaviour of the Respondent.

21. It is pertinent to note that even after amending the petition the Petitioner has not stated even a single act of alleged cruelty in the amended petition. Not only

that even in the letter Exh.58 written by him to the Respondent's father he has not mentioned that the Respondent did any particular overt act which can be considered as an act of cruelty. So, we have absolutely no hesitation to hold that the Petitioner has miserably failed to prove that conduct of the Respondent was amounting to cruelty. On the contrary, it does appear that that as only newly born child was deaf and dump, there was some unhappiness in the family on that count and probably on that count the Petitioner started harassing or ill-treating the Respondent and that created some sort of rift and differences between them. However, for the disability of child, there was no reason for the petitioner to blame the Respondent.

22. A feeble attempt was made to show that Respondent deserted the Petitioner. However, it is pertinent to note that in petition the petitioner has stated that on 12-1-1999 the Respondent left the matrimonial home and never returned thereafter. We find that petition for divorce is filed on 24-5-1999. It obviously means that necessary statutory period of two years expected for desertion as per Section 13(1)(ib) of the Hindu Marriage Act was not completed when petition was filed. So, very essential ingredient of Section 13(1)(ib) is not fulfilled by the Petitioner.

23. Incidently it must also be noted that during

pendency of the petition when petitioner started residing separately with respondent, he went out of that premises leaving respondent alone at the said place. The said act can not be justified. Petitioner in fact thus withdrew himself from the respondent. The learned advocate for the appellant argued before us that the marriage of petitioner and respondent has irretrievably broken down and as such divorce be granted. However, from the material on record it cannot be said that marriage is irretrievably broken down. Besides this even the 1971 (Amendment) Act does not permit dissolution of marriage on that ground. So, there is no substance in the argument advanced by the learned advocate for Petitioner in this behalf.

24. In view of the above discussion we have no hesitation to hold that the learned trial Judge has rightly appreciated the evidence on record and has correctly dismissed the petitioner’s petition. There is no necessity to interfere with the said order.

25. The appeal is dismissed. The Petitioner-husband is directed to pay Rs.2,000/- (Rupees two thousand) as the cost of this appeal to the Respondent.

(S.R.SATHE,J.) (S.B.MHASE,J.)